

SCOTLAND / JUDGMENT

Forbes v. Cameron [2010]

ScotCS CSIH_25 (01 April 2010)

[2010] ScotCS CSIH_25

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

Scottish Court of Session Decisions You are here: BAILII >> Databases >> Scottish Court of Session Decisions >> Forbes v. Cameron [2010] ScotCS CSIH_25 (01 April 2010) URL: <https://www.bailii.org/scot/cases/ScotCS/2010/2010CSIH25.html> Cite as: 2010 GWD 15-300, 2010 SLT 1017,

[2010] CSIH 25,

[2010] ScotCS CSIH_25 [New search] [Help] SECOND DIVISION, INNER HOUSE, COURT OF SESSION Lord Justice Clerk Lord Clarke Lord Drummond Young

[2010] CSIH 25 OPINION OF THE LORD JUSTICE CLERK In the Appeal by DUNCAN FORBES Landlord and Appellant; against KENNETH CAMERON Tenant and Respondent: Against an Order of the Scottish Land Court dated 27 October 2008

For the landlord and appellant: Sir Crispin Agnew of Lochnaw , QC ; Drummond Miller LLP For the tenant and respondent: MacIver; Balfour + Manson LLP 1 April 2010

Introduction

- [1] The appellant and the respondent are respectively the landlord and the tenant of the agricultural holding of Orrin View, Newton of Ferintosh, Muir of Ord.
- [2] The tenant acquired the tenancy by succession. He was not a "near relative" of his predecessor (Agricultural Holdings (Scotland) Act 1991 (the 1991 Act), Sched 2, Pt III, para 1). It was therefore open to the landlord to serve an incontestable notice to quit on him under sections 22(2)(g), 25(1) and 25(2)(d) of the 1991 Act within the time limits specified in section 25(2)(b)(ii). Such a notice had to specify "the term of outgo stipulated in the lease or the corresponding date in any subsequent year" (ibid). Since this Lease had gone beyond the contractual term, it was running on the statutory form of tacit relocation set out in section 3 of the 1991 Act. Any notice to quit had to be served on the tenant not less than one year before the anniversary date of the Lease (1991 Act, s 21(3)(d)). The lease provisions The Lease

- [3] The Lease was granted by the Trustees of Arthur Forbes of Culloden to Kenneth Mackintosh in 1913. It incorporates the General Articles, Conditions and Regulations for the let of farms and crofts on the estates of Culloden and Ferintosh (the General Articles). It is granted "for the space of fourteen years from and after the term of Whitsunday nineteen hundred and thirteen as regards the houses, grass and pasturage and separation of crop nineteen hundred and thirteen as regards the land under crop." The rent is to be paid "by equal moieties at Whitsunday and Martinmas beginning the first term's payment at Martinmas nineteen hundred and fourteen and the next term's payment at Whitsunday nineteen hundred and fifteen." The Lease does not define the dates of Whitsunday and Martinmas. The General Articles
- [4] The General Articles supplement the Lease in respect of entry and outgo with provisions in the old style for the handover of the holding by stages extending from 1 March to separation of crop. Seven of the General Articles refer to Whitsunday in the context of the handover arrangements; the payment of rent; irritancy for miscropping; waygoing valuations, muirburn and notices of intention to quit. In all but one of these references Whitsunday is undefined. The exception is in article 3. It provides that. "Except where stated to the contrary in the lease ... the rent shall be payable half-yearly at the terms of Martinmas (11 November) and Whitsunday (15 May)." The Notice to Quit
- [5] The landlord's solicitors served on the tenant a notice to quit dated 22 May 2008 . It was served expressly in terms of section 25(2)(b)(ii) of the 1991 Act (*supra*). It required the tenant to remove "at the term of Whitsunday (28 May) 2009 as regards the houses and grasses and pasturage and separation of the crops from the ground as regards the land under crops, in terms of the Lease ... " The tenant's notice
- [6] By Notice dated 18 June 2008 the tenant's solicitors served on the landlord the following notice: "With reference to your Notice to Quit ... dated 22 May 2008 ... we, on behalf of the tenant hereby require the question of whether the notice complies with section 25(2)(b)(ii) of the Agricultural Holdings (Scotland) Act 1991 as amended to bring it within the requirements of Section 22(2)(g) of the said Act, to be determined by the Land Court. The tenant maintains that the ish under the lease of the holding is Whitsunday 15 May ... " The definition of Whitsunday
- [7] The Act 1690 c 39 specified that for the purposes of removings the date of Whitsunday was to be 15 May. The Act 1693 c 24 (the Removings Act) extended that rule so that it applied "to all effects whatsoever." The Removings Act 1693 was repealed by the Term and Quarter Days (Scotland) Act 1990 (*infra* , s 2(3)).
- [8] The general rule that Whitsunday was 15 May was subject to the parties' right to stipulate that a Whitsunday entry would be at a different date. Where the lease provided for entry at Whitsunday without further specification, an agreement on a date other than 15 May could also be implied from the parties' actings (*Hunter's Trs v Barron*

(1886) 13 R 883; cf Rankine, Leases , 3rd ed, pp 338-340).

[9] In the nineteenth century, mainly for practical farming reasons, it became common for the parties to agree that a Whitsunday entry would be at a date in late May. Such a date often applied even if the lease provided that the Whitsunday rent was due at 15 May (eg Encyclopaedia of Scottish Legal Styles

(1937) vol VI, sv Leases, No 146).

[10] The Removal Terms (Scotland) Act 1886 dealt with the removing of tenants from houses. It defined "house" as including "a dwelling-house or building let along with land for agricultural or other purposes" (s 3). For such subjects the date of Whitsunday was 28 May (s 4).

[11] The Agricultural Holdings (Scotland) Act 1949 provided that unless the context otherwise required, Whitsunday meant 28 May (s 93(1)); but that applied only in relation to leases entered into on or after 1 November 1948 .

[12] The uncertainty surrounding the definition of Whitsunday led the Scottish Landowners' Federation to urge the Scottish Law Commission to consider options for reform. In its Report on the Scottish Term and Quarter Days (Scot Law Com No 108 (1987)) the Commission's principal recommendation was in essence that the uncertainty should be removed by the adoption of fixed dates for the term and quarter days in all cases where those dates were referred to without further specification.

[13] The Term and Quarter Days (Scotland) Act 1990 (the 1990 Act) implemented the Commission's recommendations. It established the general rule that Whitsunday was 28 May. It provided that in leases entered into before 13 July 1991 , Whitsunday was to be 28 May if that term was used in the lease "without further specification as to date or month" (s 1(4); s 1(1)(a)). Where the lease did not specify a date for Whitsunday, the Act entitled either party to make a summary application to the sheriff during the period of twelve months from 13 July 1990 for a declarator that a specific date other than 28 May was "intended in the lease" (s 1(5); s 3(2)). The Land Court 's decision

[14] By Order dated 27 October 2008 , the Order appealed against, the Land Court held that the notice to quit was invalid. It concluded that the specification of Whitsunday as 15 May in article 3 (supra) implied that that was the date of Whitsunday in all other references to it in the Lease and the General Articles. Therefore the statutory date imposed by the 1990 Act did not apply. On that view, the notice to quit gave the tenant less than the minimum period of notice. The issue

[15] The short point is whether the reference in the Lease to entry at Whitsunday is a reference "without further specification as to date or month" (1990 Act, s 1(4)(a), supra). If it is, 28 May is the date prescribed by section 1(1)(a) of the 1990 Act and the notice to quit is valid. If the reference is to be taken to mean 15 May, as the Land Court held, the appeal fails and it is now too late for the landlord to invoke sections 22(2)(g) and 25(2) of the 1991 Act to remove

the tenant. Conclusions [16] In my opinion, the Land Court erred. Its starting point was that at the date of the lease the common law date for Whitsunday was 15 May. It thought it significant that while article 3 specified that Whitsunday was to be 15 May for the purpose of payment of rent, the Lease itself provided that the rent should be paid by equal moieties at Whitsunday and Martinmas without further specification. It inferred from this reference that the unspecified date for payment of the Whitsunday moiety in the Lease must also be 15 May. From that it concluded, more generally, that 15 May applied to each of the other references to Whitsunday in the Lease and in the General Articles. I think that that was the wrong approach.

- [17] In my opinion, the decision in this case begins and ends with section 1(4) of the 1990 Act. Section 1(4) applies to "a reference" to Whitsunday that is without further specification as to date or month. I consider that, regardless of the specification of Whitsunday in article 3, the reference to Whitsunday in the entry clause is a reference without further specification as to date or month. On that straightforward ground, I conclude that section 1(4) applies to that reference. The date of Whitsunday for the purpose of entry and outgo is therefore 28 May. The notice to quit is therefore valid.
- [18] That interpretation is consistent, in my view, with the purpose of the 1990 Act which was to cut across principles of construction in documents to which it applied and to impose a pragmatic rule by which doubts in this notoriously difficult area of the law could be removed.
- [19] I am confirmed in this view by the consideration that the tenant's predecessor could have resolved any doubt as to the meaning of Whitsunday in the entry clause by applying to the sheriff under section 1(5) of the 1990 Act for a decision on the point. In such an application, it would have been open to his predecessor to establish, by reference to the lease documents and the surrounding circumstances, what date was "intended in the lease." The right to make such an application was cut off on 13 July . In my opinion, after that date the intention of the parties to the Lease, whether ascertained from the wording of the Lease or by reference to the law and practice of the time, became irrelevant and was superseded by the statutorily imposed date.
- [20] Even if the Land Court 's approach to the problem had been sound, I would not have been persuaded that the reference to 15 May in article 3 implied that the other references to Whitsunday in the Lease and the General Articles meant the same date. At the date of the Lease it was common for the date of Whitsunday for the purpose of entry and outgo to be different from the date of Whitsunday for the purpose of payment of rent (cf *Campbell v Campbell*

(1849) 11 D 1426; Rankine, op cit , p 342). In my view, the express reference to 15 May in article 3 could be taken to indicate that Whitsunday was to be given that particular date for the purpose of payment of rent, and for no other purpose. On the authority of Hunter's Trs v Barron (supra), which was then the law, the meaning of Whitsunday in the entry clause, if disputed, would have been a matter for proof.

[21] Counsel for the appellant had a fall-back submission to the effect that at the date of the Lease the references to Whitsunday would have been construed to mean 28 May by reason of sections 3 and 4 of the Removal Terms (Scotland) Act 1886 (supra). He submitted that where "a house or building was let along with land for agricultural ... purposes," the entire subjects of let were governed by the definition of Whitsunday as 28 May. That cannot be right, in my opinion. The 1886 Act related only to dwellinghouses and buildings, and not to the land with which they were let (cf Douglas v McGillivray , (1890) 6 Sh Ct Rep 88). Disposal [22] I propose to your Lordships that we should allow the appeal and return the case to the Land Court to proceed as accords. SECOND DIVISION, INNER HOUSE, COURT OF SESSION Lord Justice Clerk Lord Clarke Lord Drummond Young

[2010] CSIH 25 OPINION OF LORD CLARKE in the Appeal by DUNCAN FORBES Landlord and Appellant; against KENNETH CAMERON Tenant and Respondent: Against an order of the Scottish Land Court dated 27 October 2008

For the landlord and appellant: Sir Crispin Agnew of Lochnaw , QC ; Drummond Miller LLP For the tenant and respondent: MacIver; Balfour + Manson LLP 1 April 2010

[23] For the reasons given by your lordship in the chair I agree that the appeal should be allowed and the case returned to the Land Court to proceed as accords.

[24] It seems to me that the Land Court reached the wrong conclusion in this case because it sought to apply the ordinary rules of contractual construction in seeking an answer to the question put to it, without paying sufficient and proper regard to the significance and effect of the provisions of the 1990 Act. SECOND DIVISION, INNER HOUSE, COURT OF SESSION Lord Justice Clerk Lord Clarke Lord Drummond Young

[2010] CSIH 25 OPINION OF LORD DRUMMOND YOUNG in the Appeal by DUNCAN FORBES Landlord and Appellant; against KENNETH CAMERON Tenant and Respondent: Against an order of the Scottish Land Court dated 27 October 2008

For the landlord and appellant: Sir Crispin Agnew of Lochnaw , QC ; Drummond Miller LLP For the tenant and respondent: MacIver; Balfour + Manson LLP 1 April 2010 [25] I too agree that this appeal should be allowed for the reasons stated by your Lordship in the chair, and that the case should be remitted to the Land Court to proceed as accords. In my opinion the critical issue turns on the effect of the 1990 Act. I agree with Lord Clarke that the Land Court's error was that it approached the question before it on the basis of ordinary rules of contractual construction,

rather than on the special provisions of the Act. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2010/2010CSIH25.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotCS/2010/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/forbes-v-cameron-2010-scotcs-csih-25-01-april-2010>

Prepared on 29 October 2026 · Esheria